No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

G. WILLIAM RICE, Esq.*
Attorney General, Sac and Fox Nation
GREGORY H. BIGLER, Esq.
Assistant Attorney General
124 N. Cleveland
Cushing, Oklahoma 74023
(918) 225-4800

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Sac and Fox Nation, respectfully prays that this Honorable Court deny the Petitioner's request for a writ of certiorari. The Respondent believes that the decision of the Tenth Circuit regarding state taxation of tribal members was in line with all previous decisions of this Court and does not raise any new or unresolved areas of Federal Law. As this Court has stated: "We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 fn. 17 (1987).

OPINIONS BELOW

See Petitioner's Appendix A-1 to A-19.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Respondent believes that Petitioner's Nature of the Controversy mischaracterizes some aspects of the lower court proceedings. Respondent refers the Court to the

"Background" statement of the Court of Appeals for the Tenth Circuit contained in Petitioner's Appendix at A-2 to A-3.

The first item of disagreement is that the Respondent asserts the Petitioner was attempting to tax the value of vehicles garaged upon tribal land, and was not taxing the vehicles at issue for their use of state roads. The Petitioner also consistently refers to the "former" Sac and Fox reservation despite Petitioner's own admission that the lower courts expressly refused to rule on whether or not the Tribe's reservation was extinguished. Petitioner's Brief, p.4; *see also* Petitioner's Appendix A-4, footnote 2, and Appendix A-15. The references to "former" are an attempt to create a distinction among the various types of Indian Country for the purposes of shifting jurisdiction. Such distinction would directly contradict the holding in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, ___ U.S. ___, 111 S.Ct. 905 (1991). Petitioner furthers its effort to create distinctions among classes of Indian Country by the misstatement that the Tribal lands are not contiguous but are randomly scattered throughout state jurisdiction. While many of the lands are distributed among state lands, many are clustered together and adjoin each other. However, even this fact is not particularly relevant given the Court's prior holding in *Potawatomi*.

The State also claims that everyone who performs work in Indian Country is subject to state taxation. Respondent and the lower courts disagreed. Respondent believes that the decisions of this Court also lend no support to Petitioner's position. The Petitioner's brief claims that "the State imposes an annual registration fee

on the owners of every vehicle operated upon, over, along or across any avenue of public access in [Oklahoma]" Brief at p.3. This statement is simply not true, as the state does not tax, nor assess a fee for personal, as opposed to commercial, vehicles registered out of its jurisdiction and used upon its highways, such as cars from other states, countries or federal vehicles.

Respondent would also note that the decision of the District Court was not based only upon briefs submitted by the parties but also relied upon the extensive submissions of affidavits and evidence by the Respondent. Petitioner submitted no affidavits or evidence.

SUMMARY OF REASONS FOR DENYING PETITIONER'S REQUEST

The issues raised by Petitioner simply attempt to retrace previous decisions of this Court and somehow distinguish the facts sufficiently to justify a different legal conclusion than this Court has ever previously reached. The recent rulings of this Court consistently uphold the ruling challenged here, that a Tribal member's income derived from Indian Country employment and that property owned by a tribal member in Indian Country are, absent contrary federal statutes, exempt from state taxation. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), *Potawatomi, Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

> In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083, 1091 fn. 17 (1987).

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985).

Further, the Court has consistently held that Indian Country, as defined in 18 U.S.C. § 1151, is the territorial component for the exclusion of State authority concerning Indians and their property regardless of which component of the tripartite Indian Country definition a particular tract of land satisfies, *DeCoteau v. District Court*, 420 U.S. 425 (1975); *United States v. John*, 437 U.S. 634 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975). Petitioner attempts to reargue this Court's decisions regarding reservations and other forms of Indian Country. Despite the Court's mandate in *Potawatomi* (at page 910) "that the test for determining whether land is Indian Country does not turn upon whether that land is denominated 'trust' or 'reservation'," Petitioner mistakenly focuses upon reservation status when it is actually the classification as Indian Country that has the effect of excluding state jurisdiction. Respondent asserts that regardless of the status of its lands as reservation, the Indian Country classification falls squarely within prior Supreme Court rulings and thus excludes state taxation of Respondent's members income and property.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE PER SE RULE PROHIBITING STATE TAXATION OF INDIANS AND THEIR PROPERTY WAS PROPERLY FOLLOWED BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AS TO THE PROPERTY AND INCOME OF SAC AND FOX TRIBAL MEMBERS IN SAC AND FOX INDIAN COUNTRY.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court recognized that the federal law imposed a *per se* rule prohibiting state taxation of Indian Tribes absent the express consent of Congress. Contrary to the Oklahoma Tax Commission's position, the normal rules in tax cases do not apply when Indians or Indian property are involved. In fact, the rules for state taxation in the Indian Country are exactly the opposite of the normal taxation rules. Specifically, the Constitution vests the Federal Government with exclusive authority over relations with Indian Tribes. Indian tribes and individuals are thus generally exempt from state taxation within their own territory. As the Court stated in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985):

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to

> such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. (Citations omitted.)

The cases prohibiting state taxation of Indians within Indian Country in the absence of unmistakable authorization from Congress are legion. *Bryan v. Itasca County,* 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987); *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexicō,* 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Commission,* 448 U.S. 160 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980).

Clearly the *per se* rule of *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) and *Montana v. Blackfeet Tribe,* 471 U.S. 759, 765 (1985) remain applicable to Indian tribes in general, and the Sac and Fox Nation in particular. The corollary to this rule is that it was incumbent upon the Oklahoma Tax Commission to plead and prove specific unambiguous congressional authority both to levy and collect the particular taxes at issue. *See, County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985); *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852 (1985). Petitioner did not do so.

The Tenth Circuit ruled "that direct state taxation of tribal property or the income of a tribal member earned solely on a reservation is *presumed* to be preempted,

absent express congressional authorization." (Emphasis added.) Petitioner's Appendix at A-3. This is well in line with this Court's ruling in *McClanahan*:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by an act of Congress.

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 170-171 (1973).

The tribal member income at issue in this Petition is earned within Indian Country, and the state's motor vehicle tax is a tax on the fair market value of tribal member's personal property principally stored within the Indian Country. The state's vehicle tax is not logically related to road use and the federal government's interest in establishing strong tribal governments is at its strongest. The economic burdens of these taxes are passed on to the tribal member's dwelling in the Indian Country.

At a minimum, there has never been any case which has held that a state may tax tribal members within any part of Indian Country where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the state's taxing power. The most recent Supreme Court ruling continues to recognize this distinction. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,* ___ U.S. ___, 111 S.Ct. 905 (1991). In *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission,* 829 F.2d 967 (10th Cir. 1987), the court stated:

. . . the State cites broad dicta in *United States v. Hester* . . . in support of its proposition that Oklahoma has "complete civil and criminal jurisdiction over all citizens residing within the state . . . the present case does not involve, nor does the Tribe challenge, Oklahoma's jurisdiction over its Indian citizens outside of *Indian Country*. Moreover, *Hester* involved the authority of the state to tax a restricted Indian allotment pursuant to a specific act of Congress passed in 1928.

Oklahoma's jurisdictional theory apparently dates back to the early days of statehood. At the time, state officials and non-Indian citizens attacked federal restrictions on the alienability of Indian property by arguing that once the Indians received United States and Oklahoma citizenship, the federal government lost its authority to treat them or their land differently. (Emphasis added.)

Id. at p. 980, footnote 6.

Petitioner, Oklahoma Tax Commission relies on *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). This case is inapplicable for two reasons. First, *Oklahoma Tax Commission v. United States* does not involve a tribal government with a taxation system working toward less dependence upon outside sources. The *Oklahoma Tax Commission* case dealt with the Five Civilized Tribes whose taxing powers and other significant powers of self-government had been abolished by Act of Congress. The Five Civilized Tribes not only have different treaties but they did not have taxing governments in place to raise the issue of infringement. It has never been held that the

taxing powers of the Sac and Fox Nation were abolished. In fact the Petitioner admits the Sac and Fox may tax.

Second, *Oklahoma Tax Commission*, as well as other cases Petitioner relies on, was decided before *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams v. Lee* the Court held that state law must fail if it interferes with tribal government. Imposition of state taxation upon Sac and Fox members hinders the Nation's tax collection efforts, and violates the governmental rights of the Sac and Fox Nation secured by the *Treaty of January 9, 1789*, 7 Stat. 28, and never yet superseded.

II. PETITIONER'S RESERVATION ARGUMENT IS AT BEST IRRELEVANT AND AT WORST A RED HERRING

The argument for review boils down to the unsupported assertion that the Respondent no longer has a reservation, and therefore the lands that are held in trust by the United States for it and its members, and classified as Indian Country by this Court in *Potawatomi*, pursuant to 18 U.S.C. § 1151, is in fact not really Indian Country. What the Petitioner still fails to accept after numerous rulings by this Court is that whether or not the land is classified as a reservation does not effect whether the land is Indian Country. Reservation land is merely one of the categories of land which comprise Indian Country. *See* 18 U.S.C. § 1151.[1] Within the whole set, the three subsets,

[1] § 1151. Indian Country defined. Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the

namely reservations (§ 1151(a)), dependent Indian communities (§ 1151(b)), and allotments (§ 1151(c)), are coequal. Any distinction among the three centers on how the land came to be classified as Indian Country. Thus, while Petitioner may have an argument that Respondent's original reservation in Oklahoma was disestablished, whether the Respondent's original reservation was or was not disestablished is irrelevant to the arguments made by the Petitioner concerning Petitioner's right to tax Respondent's members within Respondent's Indian Country. The ultimate goal of the now discredited allotment policy was undoubtedly extinguishment of tribal sovereignty and eventual destruction of the reservation, but that was certainly not achieved. While citing *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683 (1992), for the foregoing proposition, the Petitioner misses the fact that this Court also recognized the continuing existence of both the Yakima Nation and the Yakima reservation.

By citing to this Court's statements in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) that "there is a significant geographical component to tribal sovereignty"

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limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.)

Petitioner hopes to somehow create a distinction between reservations and allotments. Again this Court's recent decision in *Potawatomi* directly answers the Petitioner:

> Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed. 2d 489 (1978), we stated that the test for determining whether land is Indian Country does not turn on whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the government.'

Potawatomi at 910. Thus the significant geographic factor in this case is the existence of Indian Country. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), is not to the contrary. The ski resort at issue in *Mescalero* was not merely off reservation, it was leased by the tribe instead of being either owned by or held in trust for the tribe. Thus the land did not constitute Indian Country.

The Petitioner also states as an article of faith that the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749, destroyed the Sac and Fox Reservation, absent any express language to that effect in the Allotment Act, and that the fact of allotment destroyed the Sac and Fox Government and gave Oklahoma complete jurisdiction, a position generally rejected in *Mattz v. Arnett*, 412 U.S. 481 (1973) and *United States v. Nice*, 241 U.S. 591 (1916). However, Congress expressly reserved, in Section 1 of the Oklahoma Organic Act of May 2, 1890, 26 Stat. 81, and again in Sections 1 and 3 of the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267

(enacted after the Sac and Fox Allotment Agreement), its complete and exclusive authority over the persons, property and other rights of Indians "by treaties, agreement, law or otherwise."

The intent of the Oklahoma Organic Act with respect to the Indian tribes, and therefore that of the Oklahoma Enabling Act which contains substantially the same language, is illustrated by an exchange between Congressmen Mansur and Turner during the floor debates. The purpose of the Oklahoma government vis-a-vis the Indian tribes and their territory was explained as follows:

> MR. MANSUR: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?
>
> MR. TURNER: But I suggest to the gentleman that this is no longer a reservation, but a Territory.
>
> MR. MANSUR: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*

51 Cong. Rec. 2104 (1890) (remarks of Mssrs. Mansur and Turner) (emphasis added). Perhaps in part because the allotment agreements were than being negotiated, Congressman Mansur emphasized that the Indian tribes and their reservations were to be unaffected by the creation of Oklahoma:

> I challenge any gentleman on this floor – I care not who he is – to take any one of the first twenty-four sections of this bill [the Sections

relating to Oklahoma Territory] and show where it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation. . . .

Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate.

Id. at 2176.

The Oklahoma Enabling Act, the federal statute authorizing the creation of the State, *ab initio*, preempted Oklahoma taxation of Indian Country Indians by requiring:

> That nothing contained in the said constitution shall be construed to limit or impair the rights of . . . Indians . . . or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

Act of June 16, 1906, § 1, 34 Stat. 267 (1906), and further:

> Third: That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States.

Notwithstanding the claims of the Oklahoma Tax Commission to the contrary, it appears that the proponents of the bills creating the State of Oklahoma did not think they had to destroy tribal government or Indian reservations or grant the then new State jurisdiction over either the Indians or their Indian Country in order to accomplish their purpose.

CONCLUSION

Wherefore, Respondent prays that the Oklahoma Tax Commission's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

G. William Rice, Esq.*
Attorney General, Sac and
Fox Nation
Gregory H. Bigler, Esq.
Assistant Attorney General
124 N. Cleveland
Cushing, Oklahoma 74023
(918) 225-4800

*Counsel of Record